No. 4636

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

CHUN SHEE,

Appellant,

vs.

JOHN D. NAGLE, Commissioner of Immigration of the Port of San Francisco,

Appellee.

BRIEF FOR APPELLANT.

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This is an appeal from an order dismissing on demurrer a petition of appellant for discharge on habeas corpus. Appellant is an alien and native of China, and has resided in this country about four years, having been admitted August 18, 1921, as the wife of Yee Ah Shung, native born citizen of the United States. On August 19, 1924, she was arrested under the authority of Section 19, the Act of February 5, 1917. (39 Stats. 889.) This statute provides for the deportation of "any alien who shall be found an inmate of * * * a house of prostitution or practicing prostitution after such alien shall have entered the United States."

A preliminary hearing was had in this case on August 20, 1924, and was then continued until August 29, 1924, and a deportation warrant was issued on September 3, 1924. Under that warrant a hearing was had on November 21, 1924, at which the alien was represented by counsel. Further hearing was had on December 30, 1924. At the conclusion of the hearing the record was transmitted to the Secretary of Labor, and thereafter an order was issued for appellant's deportation to China. The appellant maintains that there are three grounds upon which this writ should have been granted;

First: That she was denied a fair hearing in that

(a) The Commissioner of Immigration refused to subpoena certain witnesses after request therefor was made by the petitioner in accordance with the rules and regulations of the department.

(b) That the Commissioner, in arriving at his decision, took into consideration the investigation of Inspector Benson, who interrogated the witnesses desired to be subpoenaed by appellant, and took into consideration the said inspector's version of what these witnesses would testify, without giving to the petitioner an opportunity to cross-examine those witnesses.

Second: That the order of deportation is not based upon evidence sufficient to warrant such an order being made.

Third: That the issuance of the order for arrest is unsupported by the proper showing as required by Section 18 of the Immigration rules.

THE FACTS.

The sole charge against this applicant is "that she has been found practicing prostitution after her entry." The charge against her, as set forth in the warrant of arrest, is indefinite as to time, place and particulars, and the testimony offered by the Government in support of the charge is not much more specific, making it most difficult for the defendant to offer more than a general denial of the charge.

It appears that Miss Donaldina Cameron, in charge of a rescue mission, was searching for a young Chinese woman (other than the petitioner), whom she located at 34 Beckett Alley, and made a raid on those premises. All the persons found therein, including this defendant, who was arrested as a prostitute, were tried in the Police Court and acquitted. It is not claimed by the Government that the petitioner was an occupant of a house of prostitution or was engaged as such at the time of the alleged raid; she and another Chinese woman occupying the two rooms which were rented by the husband of the detained, and for which he paid the rent.

The Government produced, at the various hearings, six witnesses. Two police officers (government witnesses) testified that the petitioner was not a prostitute and had never attended tong banquets and flatly contradicted the other four witnesses proffered by the Government. These four witnesses were Chinese women who had, at some time or other, been prostitutes in the City of San Francisco,

and who were inmates of a rescue mission and who are evidently being kept in this country for the purpose of acting as professional witnesses in this class of cases. Their testimony in general was, that at some time at least one year previous to the date of the arrest they knew the petitioner and knew her to be a woman who frequented tong banquets and had at some time accompanied men to various hotels in the City of San Francisco. Their testimony was so general, without any specific dates, places, names of hotels, that the petitioner was unable to meet these generalities except by a general denial. In only one particular instance were these four witnesses definite as to a specific address and place, and that was that the applicant lived at 719 Sacramento Street, San Francisco, at the time when they knew her, and that at that time they claimed she was practicing prostitution in those premises. It will thus be seen that the facts and circumstances regarding the petitioner's alleged residence at 719 Sacramento Street, and whether or not she practiced prostitution there, is of the most vital and utmost importance, and it is in regard to this particular bit of testimony that the refusal of the Immigration Authorities to issue a subpoena for the owners and managers of 719 Sacramento Street, San Francisco, rendered the entire hearing unfair. That act of the Immigration Authorities was so prejudicial to this petitioner as to make the whole proceeding a farce instead of an orderly and fairly conducted hearing such as is contemplated by the

laws of the United States, the decisions of the Supreme Court and the rules and regulations of the department.

A more detailed discussion of the evidence will be discussed under point II in this brief wherein it is the petitioner's contention that in no event is there any evidence sufficient to warrant the making of an order of deportation.

I.

(a) THE HEARING WAS UNFAIR FOR THE REASON THAT THE COMMISSIONER OF IMMIGRATION REFUSED TO SUBPOENA CERTAIN WITNESSES AFTER REQUEST THEREFOR WAS MADE BY PETITIONER.

It will be specifically noted that the Government did not claim that this woman was an inmate of a house of prostitution, or that there were any circumstances surrounding her arrest upon which such a fact could be found, but relied exclusively upon the testimony of four self-confessed prostitutes who vaguely testified that at a time approximately one year prior to the date of the arrest that they knew this petitioner, and that at the time she was known to them she was practicing prostitution at 719 Sacramento Street, in the City of San Francisco. All of the rest of the testimony was so vague that it could not be controverted at any point, except as to this particular bit of testimony.

The Government, having rested its case upon the conduct of the petitioner at a date one year previous

to the arrest, at which time it was claimed she was practicing prostitution at 719 Sacramento Street, San Francisco, California, it became of the most vital importance that this testimony be controverted by the petitioner by evidence of the people owning or operating 719 Sacramento Street, San Francisco, California. As will be noted from the statement of counsel in the record hereinafter quoted in full, he made an investigation himself of the premises and talked to the partners there and requested them to become witnesses in the case and testify as to their knowledge of the petitioner. They refused to testify, and the foundation was then laid for the issuance of a subpoena, and a request was made therefor in the following language.

At the conclusion of the hearing of December 9, 1924, the following request was made by counsel for the alien:

> "I would like to make a statement for the record, *to lay the foundation to have a subpoena issued on behalf of the defense in this case.* After the conclusion of the last hearing I suggested to the husband of this defendant * * * to endeavor to have the owners or lessees of the place appear at this office and testify as to what they knew, if anything, about this case,—of her living at those premises or of any other person of lewd character ever having lived there. He reported to me he went to 719 Sacramento Street and interviewed the partners of the Wing Tai Yuen Company, but they refused to interest themselves in the case, in any manner, whatsoever, owing to the fact that he is not a clansman and that they had no interest in his wife and did not care to mix

up in a Chinese case. I * * * went to the firm of Wing Tai Yuen, at 719 Sacramento street, and walked in, and I found when I reached the store that I knew the firm very well, and knew the manager, a man named Lee Yik. * * * I presented the case to Lee Yik, whom I have known for twenty years, and who bears a good reputation as a merchant and a Chinese interpreter. I explained this case to him in full. He told me that he never met this defendant. Chan Ah Ho, that she never lived in the store premises or in the rear of the store premises, or anywhere at that store of Wing Tai Yuen Company, 719 Sacramento street, that he never heard of a woman named Choy Yung Goo, or a woman by the name of Goo Goo Yun, that these women never lived, at any time, in those store premises, nor did they solicit prostitution there or were, so far as he knows, or other partners in the store know, that they were procuresses, that they never lived or procured or solicited, from that store or in that store premises, women or men for the purposes of prostitution. I insisted that he should come here as a witness and he absolutely refused to do so. He said, 'You would not expect me to mix up in some other family case where the question of prostitution is raised, or would you expect me to appear and testify as to the conditions of my store, now or at any other time, for people who are not my clansmen.' He also stated that one reason he would not appear was that he would pay no attention to any testimony—or would it interest him—the testimony of prostitutes from the Mission. *The testimony is very vital to this case, positively, definitely.*"

Both the Immigration laws and rules of the Department of Labor provide for the issuance of a

subpoena under circumstances such as the request for the subpoena disclosed.

Section 16 of the Act of February 5, 1917, provides as follows:

> "Section 16. * * * any commissioner of Immigration, or inspector in charge, shall also have power to require, by subpoena, the attendance and testimony of witnesses before said inspectors."

The rules and regulations of the Secretary of Labor under date of February 1, 1924, provide as follows:

> "Rule 23. Subpoenaing witnesses. Subdivision A.—When power exercised.
>
> Paragraph 1. * * * If an alien requests that a witness be subpoenaed, he shall be required to show affirmatively that the proposed evidence is relevant in material and that he has made diligent efforts, without success, to produce the same. * * * But when a witness has been examined by the investigating officer and counsel has not had an opportunity to cross-examine such witness and it is apparent or is shown that such witness will not appear for cross-examination unless commanded to do so, a subpoena shall issue."

Immediately upon the conclusion of the hearing the inspector in charge went to 719 Sacramento Street and took the statement of a man who pretended to be the manager of the premises, and the following question was asked of that person:

> "Q. I wish to advise you that Attorneys Stidger and Sapiro who are representing the Chinese woman, Chan Ah Ho, have stated that

Lee Yick was the manager of this store and have requested that I call here to interview Lee Yick and to examine the premises.

A. I have just telephoned to Lee Yick and he refuses to come. He does not want to talk to you.

Q. Will you again call Lee Yick and tell him an officer from the Immigration Service is here at the request of Attorney Stidger and would like to talk to him? (Note. Witness goes to telephone and talks in Chinese.)

A. I have called him again on the telephone and he refuses to come.

Q. Do you know a man by the name of Lee Lun?

A. Yes, he is a partner."

Inspector Benson, in his report to the Commissioner of Immigration on December 12, 1924, wrote the following:

"Mr. Stidger requested that an investigation of this store be conducted by an officer of this service, and, if possible, the manager Lee Yick, be subpoenaed in order to have him testify regarding the character of the store. * * * A statement was taken from Lee Chin which is transmitted herewith. It will be noted in the statement of this Chinese, Lee Lim, that he got in communication by telephone with Lee Yick, to come to the store at 719 Sacramento Street, but Lee Yick refused to be interviewed. He (Lee Lim) stated that he did know Lee Yick but that Lee Yick was not connected with the firm in any manner. * * * At the time I called the store appeared to be a legitimate place of business. * * * I believe a date for further hearing in this case should be set in order that the statements of Police Officers, Manion and Floyd might be introduced and

made a part of the record as well as the statement of Lee Lim and partnership list of the firm of Wing Tai Yuen. If the attorneys of record so desire Police Officers Manion and Floyd will be produced for cross-examination."

On December 12, 1924, a letter was written by the Commissioner of Immigration to the attorneys in this case, a part of which reads as follows:

> "At the conclusion of hearing in the case of your client, Chun Shee, held December 9, 1924, you made a statement in which you requested that the store of Wing Tai Yuen, 719 Sacramento Street, be investigated with the view of having the Manager, Lee Yick subpoenaed to testify regarding the character of the store.
>
> Inspector Benson on the same day conducted an investigation of this store and from his report it appears that Lee Yick is not connected with the firm of Wing Tai Yuen Company. Inspector Benson secured statements of Police Officers Manion and Floyd and also a statement of Lee Lim who claims to be Manager of the Wing Tai Yuen Company; these statements are enclosed herewith.
>
> Further hearing in this case will be held at this office, 68 Appraisers Building, December 18, 1924, at 2:00 P. M. in order that the testimony of Sergeant Manion, Officer Jack Floyd and the Chinese, Lee Lim, might be introduced and made a part of the record. Should you desire to *cross-examine any of these witnesses kindly advise* and they *will be produced at this office on the above date for cross-examination.*"

Thereafter Sergeant Manion and Officer Floyd were produced for cross-examination, and it will

be noted that they absolutely repudiated the affidavits secured from them, and failed and were unable to identify the petitioner, Chun Shee, as a prostitute, and further stated that although they had attended all of the Tong banquets in San Francisco that the petitioner was never present at any of them. The Government failed to *produce the witness Lee Lim for cross-examination and relied upon his statement that Lee Lim was not the manager* of the store, and failed to subpoena either Lee Yick or Lee Lim and give the petitioner an opportunity of cross-examination or the benefit of their testimony at this hearing.

That part of Section 16 of the Act of February 5, 1917, giving the right of the Commissioner of Immigration to subpoena witnesses, and Rule 23 of the Immigration rules above quoted, was not put into the law for any idle purpose.

Originally Section 16 (34 Stats. at Large 903) did not have a provision in it giving the Commissioner the right to subpoena witnesses. In 1911 the Supreme Court of the United States considered this fact in the case of *Low Wah Suey v. Backus,* 225 U. S. 470, 58 L. Ed. 1168, where it said: "The statute does not give authority to issue process and compel the attendance of witnesses." The contention had been advanced in that case that the failure of the Commissioner to subpoena material witnesses on behalf of the detained rendered the hearing unfair. But the Supreme Court said, and rightfully,

that there being no provision in the statute to compel the attendance of witnesses, and that Congress, having the right to lay down the procedure governing the hearing, had failed to give the alien that privilege; that the failure to subpoena witnesses was through no fault or neglect of the Commissioner, and that the alien could not complain.

In 1917 the Statute was amended so as to give the Commissioner that power. (Act of February 5, 1917, ch. 29, §16, U. S. Comp. St. 4289¼i), and thereafter Rule 23, which is hereinbefore quoted, was promulgated by the Secretary under the authority vested in him under Section 23 of the General Immigration Laws, which provide: "He shall establish such rules and regulations so as to make effective all laws relating to the immigration of aliens into the United States." And it is, of course, conceded that these rules and regulations have the force and effect of law when not inconsistent with the provisions of the act itself, or of the Constitution of the United States, or the treaties of this country with foreign powers, and are binding on the courts.

> *Ex parte Chow Chok,* 161 Fed. 627;
> *Fok Young Yo v. United States,* 185 U. S. 296, 46 L. Ed. 917.

In the case of *Johnson v. Tertzag,* 2 Fed. (2d) 40, the Circuit Court of Appeals said:

> "It is as much the duty of the immigration officials to admit aliens exempted from the

> general policy of exclusion as it is to exclude those falling within the excluded classes. Administrative officials may not *ignore essential parts of the statutes they are administering.*"

In the case of *Ex parte Tozier,* 2 Fed. (2) 268, the Court said:

> "It cannot be too often repeated that administrative tribunals which exercise such tremendous powers over the liberty or persons without the safeguards which experience had shown necessary in court proceedings, and which are at once policeman, prosecutor, judge and jury, are bound to a scrupulous regard for the rights of persons affected by their action."

As to what constitutes an unfair hearing the Supreme Court of the United States, and the various Circuit Courts of Appeal have repeatedly passed upon that question, and in *Kwock Jan Fat v. White,* 253 U. S. 454, 64 L. Ed. 1010, that Court summed up the law concisely as follows:

> "It is fully settled that the decision by the Secretary of Labor, of such a question as we have here, is final, and conclusive upon the courts, unless it be shown that the proceedings were 'manifestly unfair', were 'such as to prevent a fair investigation,' or show 'manifest abuse' of the discretion committed to the executive officers by the statute (Low Wah Suey v. Backus, supra), or that 'their authority was not fairly exercised; that is, consistently with the fundamental principles of justice embraced within the conception of due process of law.' Tang Tun v. Edsell, 223 U. S. 673, 681, 682, 56 L. ed. 606, 610, 32 Sup. Ct. Rep. 359. The decision must be after a hearing in good faith,

however summary (Chin Yow v. United States, 208 U. S. 8, 12, 52 L. ed. 369, 370, 28 Sup. Ct. Rep. 201), and it must find adequate support in the evidence (Zakonaite v. Wolf, 226 U. S. 272, 274, 57 L. ed. 218, 220, 33 Sup. Ct. Rep. 31)."

In *Whitfield v. Hanges,* 222 Fed. 745, at 749, the Court said:

"Indispensable requisites of a fair hearing according to these fundamental principles are that the course of proceeding shall be appropriate to the case and just to the party affected; that the accused shall be notified of the nature of the charge against him in time to meet it; that he shall have such an opportunity to be heard that he may, if he chooses, cross-examine the witnesses against him; that he may have time and opportunity, after all the evidence against him is produced and known to him, to produce evidence and witnesses to refute it; that the decision shall be governed and based upon the evidence at the hearing, and that only; and that the decision shall not be without substantial evidence taken at the hearing to support. In re Rosser, 101 Fed. 562, 567; In re Wood & Henderson, 210 U. S. 246, 254, 52 L. Ed. 1046; Interstate Commerce Commission v. Louisville & Nashville R. R. Co., 227 U. S. 88, 91-93, 57 L. Ed. 431; Ex parte Petkos (D. C.) 212 Fed. 275-278; United States v. Sibray (C. C.) 178 Fed. 144, 149. That is not a fair hearing in which the inspector chooses or controls the witnesses, or prevents the accused from procuring the witnesses or evidence or counsel he desires. Chin Yow v. United States, 208 U. S. 8, 11, 12, 28 Sup. Ct. 201, 52 L. Ed. 369; United States v. Sibray (C. C.) 178 Fed. 144, 149; United States v. Williams (D. C.) 185 Fed.

598, 604; Roux v. Commissioner of Immigration, 203 Fed. 413, 417, 121 C. C. A. 523."

And at page 753:

"And that is not a fair hearing in which the inspector with his control of important witnesses takes their statements in a secret ex parte examination before himself prior to the hearing, and then refuses the request of the accused to call them, or to request them to testify at the hearing, and thereby deprives the accused of the opportunity to examine or cross-examine them and to have the benefit of their testimony. Chin Yow v. United States, 208 U. S. 8, 11, 12, 28 Sup. Ct. 201, 52 L. Ed. 369; United States v. Sibray (C. C.) 178 Fed. 144, 149; United States v. Williams (D. C.) 185 Fed. 598, 604; Roux v. Commissioner of Immigration, 203 Fed. 413, 417, 121 C. C. A. 523."

The last case of the United States Supreme Court on this subject is *United States ex rel. Bilokumsky v. Tod,* 263 U. S. 148, 155, 68 L. Ed. 221, 224, where the Court said:

"It may be assumed that one under investigation with a view to deportation is legally entitled to insist upon the observance of rules promulgated by the Secretary pursuant to law."

and in this case we insist upon the observance of rules promulgated by the Secretary pursuant to law. We insist upon the right to have a subpoena issued to bring in the owners and manager of 719 Sacramento Street and let them testify to whether or not this appellant ever, or at all, either lived at or practiced prostitution in the premises known as

719 Sacramento Street, and thus to controvert the testimony adduced by the Government and upon which it rests the case. To deny this right to the appellant is to strip her of every constitutional guarantee and every opportunity for defense that the law has afforded her in cases of this kind. And one might just as well strike from the statute books every rule for the protection of an alien in a hearing and overrule every decision of the Supreme Court and the Circuit Courts of Appeal, giving to an alien the right of a fair hearing if this arbitrary authority arrogated to itself by the Department of Labor should be sustained.

It certainly should not take much argument to convince this Court that where a congressional enactment has been placed upon the statute books which provides for the subpoenaing of witnesses to enable the detained to make her defense, and that thereafter the Secretary of Labor has promulgated a rule to carry this into effect, that an examining inspector cannot disregard that rule, brush it aside and refuse to subpoena the witnesses requested by her. This is not a case where the department is unable to locate the witnesses, but is one where the department simply has refused to do so on some theory best known to them, and have prejudged her case. Certainly orderly procedure, and the fundamental requirements of a fair hearing does require that in the instant case the witnesses should have been subpoenaed and the testimony taken in the presence of the detained.

How can the department justify its action in refusing to subpoena the witnesses after a demand therefor? In this case they say—"We went out and talked to the witnesses—what you claim they will testify to—they deny. Therefore we will incorporate their denial into the record and you will not be given an opportunity either to examine or cross-examine them." And that was precisely done in this case. Is that the fair hearing contemplated by the Supreme Court and the laws? To merely state the proposition is to answer it.

And it cannot be claimed that the evidence sought from the witness for whom the subpoena was demanded was of little importance. *It was most vital.* For if it could be shown that appellant had never lived or practiced prostitution at 719 Sacramento Street, which is a store, then the Government's case would have been completely shattered, as their witnesses would have been shown to be testifying falsely on the only fact on which they testified definitely.

(b) THE HEARING WAS UNFAIR IN THAT APPELLANT WAS NOT GIVEN AN OPPORTUNITY TO CROSS-EXAMINE THE WITNESS LEE LIN.

The manager of No. 719 Sacramento Street was examined by the inspector and no opportunity to cross-examine him was afforded to petitioner or her attorneys, and that this examination was relied upon in part by the department in making its order

of deportation. Subdivision "a", Rule No. 23, set out on page 5 of the petition, reads as follows:

> "Rule 23. * * * But when a witness has been examined by the investigating officer and counsel has not had an opportunity to cross-examine such witness and it is apparent or is shown that such witness will not appear for cross-examination unless commanded to do so, a subpoena shall issue."

The hearing was conducted in violation of this rule, and renders the hearing unfair. In the very recent case of *Ungar v. Seaman,* Immigration Inspector, 4 Fed. Rep. 2d Series (advance sheets, May 7, 1925), the Circuit Court of Appeals for the Eighth Circuit held:

> "In proceedings for deportation of an alien who has been a lawful resident of the United States, he is entitled to a hearing and decision of the charges against him according to the fundamental principles that inhere in due process of law, and indispensable requisites of such hearing are that the course of proceeding shall be appropriate to the case and just to him, that he shall be notified of the charge against him in time to meet it, shall have an opportunity to be heard and to cross-examine the witnesses against him, and shall have time and opportunity, after the evidence against him is produced and known to him, to produce evidence and witnesses to refute it, and that the decision shall be governed by and based upon the evidence at the hearing."

As we have stated before the General Immigration Act of 1907 did not give to a defendant the right of cross-examination of any witnesses who

had submitted evidence upon behalf of the Government. That such was permitted has been repeatedly upheld by the Supreme Court of the United States and the various Circuit Courts of Appeal. Notwithstanding this, the proposition was so revolting to the public conscience that when Congress enacted the Immigration Law of 1917 they placed a material amendment in the new law which gave the defendant the right to cross-examine witnesses whose evidence was submitted by the Government against him, and it also gave the defendant the right to compel the attendance of witnesses by subpoena. In examining cases submitted pro and con upon this point it is essential to observe which of the immigration acts was involved and considered because the Immigration Act of 1907 does not give the rights which are asserted in this present case and which are accorded in the Immigration Act of 1917.

In *Ex parte Jackson* (263 Fed. 110), Judge Bourquin held as follows:

> " * * * Insofar as petitioner asserts unfairness, in that his objections are excluded from the record, the rules permit objections to be made in briefs. Whether fair or not in ordinary cases, in a case wherein the alien's rights have been infringed to the extent here, the court will take note of it, whether or not objections have been made with technical precision, and hold the proceedings unfair. So were the proceedings for failure to produce Ambord for cross-examination. The rules require his production. The condition the inspector imposed is unwarranted. It is author-

ized only in respect to petitioner's witnesses, and not in respect to government's witnesses and their cross-examination. Ambord was a vital witness. He identified pamphlets as those seized, an essential link in the chain of circumstances. Although there was another witness to the same matter, none the less was the alien entitled to the benefit of the rule, and to cross-examine Ambord; and failure to produce Ambord denied the alien the due process of the rule, and is fatal to fairness of the proceedings. It cannot be said that in any event the decision would have been the same, unless it also be said that in any event the alien was to be deported."

The Government perfected an appeal from this decision to this Court, but recourse to the records shows that the same was thereafter dismissed. (267 Fed. 1022.)

Another decision of Judge Bourquin to the same effect is *Ex parte Radivoeff* (278 Fed. 227), in which it was held:

"In addition to the unsupported warrant, the alien a witness against himself, quasi secret rather than open and public hearings, which it is not determined of themselves alone would be fatal to fairness, there is flagrant disregard of the department's rules and of the general law of evidence and procedure. The object of Rule 22, to enable the alien to prepare for hearing and therein to have counsel, not partially, but throughout, was defeated, probably in conformity to the secret circular of the time, and set out in the Colyer Case (D. C.) 265 Fed. 46.

"So, too, the great test of truth, cross-examination of adversary witnesses provided by Rule 24, was denied the alien. The conditions prece-

dent imposed by Andrews, by the rule, relate to the alien's witnesses, and not to the government's witnesses. To disclose what the alien expects to prove by cross-examination is subversive of the object of cross-examination, is violative of settled procedure, and is contrary to said rule. In re Jackson (D. C.) 263 Fed. 110.

"In deportation hearings, if the department resorts to statements, whether or not verified, by inspectors and others, failing to produce the makers of the statements for the alien's cross-examination, it cannot escape the consequences of ex parte and incompetent evidence by any plea of distance and expense. Without cross-examination, too often the alien is helpless. U. S. v. Uhl (C. C. A.) 266 Fed. 38, is illustrative. Therein the alien was deported upon a charge like that of the instant case, and the only evidence thereto was an affidavit that the alien had been heard to say that if 'the strike is not settled' he would 'blow up the shops'. The alien, examined on oath at the hearing, denied he had said it. The maker of the affidavit, whom the inspector later said was 'a private detective hired by the city' of the strike, was not produced nor requested to be produced for cross-examination—'out of town', and the affidavit prevailed over the alien's denial.

"As a corollary to the rule aforesaid, the law also is that if the proceedings are without the support of substantial and competent evidence or otherwise unfair, the department's adverse decision is subject to review in the courts, and to be defeated by habeas corpus in release of the alien. This is the case. Writ granted."

The cases of *Kwock Jan Fat v. White,* supra, *Whitfield v. Hanges,* supra, *United States ex rel.*

Bilokumsky v. Tod, supra, heretofore cited under subdivision A of point 1, have also very pertinent language relating to the right of cross-examination of witnesses produced by the Government.

The department, recognizing the right of cross-examination, wrote a letter to the attorneys for the appellant under date of December 12, 1924, which is quoted at length on page 10 of this brief, after they had taken the ex parte affidavits of Officers Floyd and Manion and Lee Lim, the alleged manager of 719 Sacramento Street, and said as follows: "Should you desire to cross-examine any of these witnesses kindly advise. They will be produced at this office on the above date for cross-examination." On December 18, 1924, after request was made for the cross-examination of these witnesses, the Government produced Officers Floyd and Manion, who on cross-examination absolutely repudiated their alleged ex parte affidavits and failed to identify the appellant. Why and for what reason Lee Lim was not produced for cross-examination does not appear in the record, and this failure is of such material error that in and by itself would be sufficient ground for the granting of the petition.

II.

The order of deportation is not based upon evidence sufficient to warrant such an order being made. Appellant recognizes the rule so many times

announced and adhered to by this Court: that it is not the Court's function to weigh the evidence in this class of cases. But as this Court has announced in *Ong Chow Lung v. Burnett,* 232 Fed. 853 (C. C. A.), and reiterated in *Chan Kam v. U. S.,* 232 Fed. 855 (to which we will refer at length later in this brief), the true rule is:

> "It is not our function to weigh the evidence in this class of cases, but we may consider the question of law whether there was evidence to sustain the conclusion that the appellant, when he first came, fraudulently entered the United States. We find that that conclusion rests upon conjecture and suspicion, and not upon evidence. In the absence of substantial evidence to sustain the same, the order of deportation is arbitrary and unfair, and subject to judicial review. Whitfield v. Hanges, 222 Fed. 745, 751 (138 C. C. A. 199); McDonald v. Siu Tak Sam, 225 Fed. 710 (140 C. C. A. 584); Ex parte Lam Pui (D. C.) 217 Fed. 456."

Appellant's contention in brief is that the Government's case rests entirely on suspicion and conjecture and not upon evidence. The only testimony in the case is that of four misguided girls who evidently remain in the country and are not deported as long as they act as professional witnesses, and which does not rise to the dignity of evidence when considered as a whole. A mass of generalities—nothing more, and only definite on one point, and as to that the appellant was denied the right of subpoenaing witnesses so as to refute it.

It appears that Donaldina Cameron, in charge of a rescue mission, was searching for a young Chinese woman by the name of Chew Ling, whom she located at 34 Beckett Alley, San Francisco, and on August 19, 1924, in connection with San Francisco police officers, made a raid on said premises, and apparently arrested all of the persons found therein, including this defendant, who was arrested as a prostitute, tried in *Police Court and acquitted.* Apparently the evidence presented against her in Police Court was substantially the same as that presented in this record.

The charge that the premises at 34 Beckett Alley was a house of prostitution was disproved in Police Court, as the keeper of the premises, who was arrested at the same time as this defendant, was tried and acquitted. It further appears that the Chinatown detective squad of the San Francisco police department, whose business it is to ferret out such places, had no information that said premises were being used as a house of prostitution.

The only evidence offered which might be considered as giving support to the charge is the testimony of four self-confessed ex-prostitutes. They are not credible witnesses. They are self-confessed law breakers and moral degenerates. In a recent case (*In re Verbich,* 1 Fed. (2d) 589) a United States Court refused to grant naturalization to an alien because one of his witnesses had been a "bootlegger", and the Court held that he was not a cred-

ible witness. The said four witnesses in the pending case are under the control and jurisdiction of said Miss Cameron, who made the misleading statement, above mentioned, upon which the warrant of arrest in this case was predicated. They are dependent upon her for their food and shelter, and doubtless are relying upon influence to prevent their deportation to China. It could hardly be claimed that they are free moral agents. Any one who has read testimony given by Miss Cameron in such cases will recognize that these witnesses have little or no regard for the truth; they have no sense of honor or justice and are not concerned about the injury they may inflict upon an innocent person—with them it is more a question of food, shelter and protection for themselves. Three out of the four said witnesses, Rose Wong, Lilly Chan and Lily Lum are apparently professional witnesses for the mission and their names have become quite familiar in cases originating through Miss Cameron.

Miss Donaldina Cameron does not claim any personal knowledge regarding the character of this defendant.

Police Sergeant Manion, in charge of the Chinatown squad, gives no testimony which would indicate even a suspicion that this defendant ever practiced prostitution.

Police Officer John F. Floyd identified the photograph of this defendant as a woman whom he had seen at many tong banquets, but when he was con-

fronted with the defendant in person, admitted that he had made a mistake and she was not the woman he had in mind. There is nothing whatever in his testimony reflecting upon the character of the defendant. We will now make a brief reference to the testimony of the four self-confessed ex-prostitutes:

Rose Wong says she first met this appellant in a store, 719 Sacramento Street, in the latter part of 1921; that she saw her in numerous tong rooms and tong headquarters so many times that she cannot count them all; that she has never seen her practice prostitution but "assumes that she is a prostitute" because she attended carousals, etc.; she does not know of any men who slept with this defendant for money. * * * Even if she were a credible witness, her testimony would be worthless to substantiate the charge against this defendant. She merely assumes that the defendant was a prostitute. With the exception of the store above mentioned, this witness does not mention a single street and number, or the name of a place, or a single specific date when and where she saw this defendant. She does not mention a single specific act of prostitution on the part of this defendant.

Lily Lum claims to have first met the defendant at 719 Sacramento Street at the Wing Tai Yuen store and that she knew her from January, 1922 to January, 1923. She claims that the defendant lived at this store a year and a half or two years and a half. She does not claim to have any actual knowl-

edge that this defendant practiced prostitution; nor does she relate any other incriminating actual facts. The full extent of her knowledge, according to her claim, is that the defendant went to certain hotels with men, but merely going to a hotel with a man does not warrant the conclusion that prostitution was indulged in. Suspicion is not proof, and her testimony is utterly lacking in essential incriminating facts.

Lung Ah Sun testified that she first became acquainted with this defendant about May or June, 1923, at the Hang Far Low restaurant, where they dined at the same table. She makes the broad statement that this defendant "has been to almost every hotel in Chinatown to practice prostitution that I know of", but she does not mention a single specific time and place, nor give any essential facts showing that she has any definite knowledge that the defendant practiced prostitution.

Lily Chan testifies that she became acquainted with the defendant in the latter part of 1921. She says the defendant lived at 719 Sacramento Street from 1921 until May, 1923. The latter date is the time this witness went to the mission and she did not see the defendant thereafter. This witness stated that she does not know of any particular hotel or rooming house where the defendant practiced prostitution; that all she knows is that she has seen the defendant "solicit" at banquets, and when pressed for something more definite, she contradicted her former statements and stated that she

has seen the defendant practice prostitution at the Grand View Hotel but cannot remember when. It is not necessary to comment on her testimony. She either committed perjury in her original statement or in the later statement.

As heretofore mentioned, the only evidence in support of the charges against this defendant, is the testimony of four self-confessed ex-prostitutes and law breakers, apparently produced at the instance of Miss Cameron, who made the misleading statement which formed the basis for the issuance of the warrant of arrest. Three of said witnesses are aliens and are in this country in violation of law. They have each sworn that she practiced prostitution after her entry into this country. Section 19 of the Immigration Law of 1917, provides:

> "Any alien who shall be found * * * practicing prostitution after such alien shall have entered the United States, * * * shall, upon the warrant of the Secretary of Labor, be taken into custody and deported."

This country is coming to a dangerous pass if aliens of the type and character of these witnesses may control the destinies of native-born American citizens, and, upon their unsupported statements, break up his home and have his wife deported to China, while they, who confess to being guilty of the same crime with which they charge this defendant, remain immune from prosecution and live on the charity of the American people.

So far as can be determined from the record, no two of said witnesses testified to the same act of alleged prostitution. Thus the proof fails to support even a single act of alleged prostitution for on the one side, supporting the charge, is only the testimony of one self-confessed law breaker, and on the other side, is the positive and unequivocal denial of the defendant who is presumed to be innocent until proven guilty, and her testimony, as we will hereinafter show, is corroborated in part by other testimony and by certain facts and circumstances. The burden of proof is on the Government and it has not been sustained. Prostitution must be proved in the same way as any other offense and it cannot be proved by the conjecture of a single witness regarding any specific act when such testimony is rebutted with more weighty evidence. The decision of the Secretary of Labor must rest upon *facts* proved and cannot rest upon mere surmise, speculation, conjecture or suspicion.

No. 34 Beckett Alley was not a house of prostitution, and was not known as such by the police department. The keeper of said apartments was arrested at the same time as this defendant, tried in Police Court and acquitted.

The husband is an American citizen. He works in a laundry at 145 8th Street, San Francisco, from 7 in the morning until 10 at night, and only went home regularly on Saturday nights, and occasionally at other times. His board and lodging was

furnished by the owner of the laundry and it was part of the work that he sleep at the laundry. He paid $12 per month for the two rooms occupied by his wife at Beckett Alley, and he had a charge account for her at the Tong Chong grocery store where she could get whatever she needed, and he paid the bill every Sunday. He says he is positive his wife never attended any tong banquets. He paid for everything. That she has no jewelry, except a diamond ring he gave her, and she has no gaudy or expensive clothes.

The Immigration inspectors never fail to lay great stress upon the conduct, personal appearance and manner of women defendants and applicants for admission who are suspected of being prostitutes. They are absolutely silent in this respect concerning the present defendant, from which it must be inferred that she possessed none of the traits or appearances indicating that she was an immoral woman. Detective Sergeant Manion who arrested this defendant and the woman who was found in bed with her, admitted that nothing immoral was found in the rooms occupied by the defendant.

There is a possibility that the four witnesses from the mission made a mistake in the identification. It will be noted that Officer Floyd made such mistake. From a photograph exhibited to him he identified this defendant as a person he had seen at many tong banquets, but when he saw the defendant in

person, candidly admitted he had made a mistake. The four witnesses from the mission had previously identified the defendant from a photograph and informed Miss Cameron that they knew her. Even if they realized that they had made a mistake, unlike Officer Floyd, they did not have the courage to admit it for fear of the consequences. If Officer Floyd, who is accustomed to making identifications from photographs, could make a mistake of this kind, it is very evident that persons who are not accustomed to making such identifications, are much more likely to make a mistake.

The testimony at the most creates only a suspicion which is not sufficient to warrant an order of deportation. This had been decided by the Circuit Court of Appeals for the 9th Circuit in *Chan Kam v. United States,* 232 Fed. 855, and the opinion is very illuminating on the whole subject. That case is a far stronger case for the Government on the facts than the case at bar, yet this Court considered and weighed the testimony and even though the lower Court had denied the writ, granted the writ and discharged the woman. We suggest that a careful reading of the case will guide the Court in arriving at a similar conclusion in the present case. The Court said:

> "We think this objection to the proceedings is well taken. It appears from the examination to which reference is made that Chan Kam was married and was living with her husband. She was asked by the Immigration officer:

'When you were arrested, at that time you were found in bed with a Chinaman who was not your husband?

No; I was standing beside the bed, and the man was in the bed.'

She was then told that the officers who arrested her said she was in bed with Jew Lin when she was arrested. She answered:

'That is not true. I was standing beside the bed.'

She was asked:

'Had you been in bed with the man before the officers came into the room?'

She answered: 'No'.

She was then asked:

'What were you doing in the room with the door closed at that time of the night (9 o'clock) and a strange man in your bed, with your husband absent?'

She answered:

'It was my room and bed, and Jew Lin was in bed, waiting for my husband.'

It is contended by the government that this testimony is evidence of improper relations with the man with whom she was found and arrested, and proof that she was engaged in the practice of prostitution; but the testimony of the officers who made the arrest is not in the record, and we do not know from them what the situation of the parties was at the time the arrest was made. In that aspect of the evidence there is, at most, only a suspicion, which is not sufficient. The testimony of Chan Kam is that she is married; that one Ho Bat is her husband; that she was not a prostitute, and had never practiced prostitution, and was not at the time of her arrest, or at any other time, an inmate of a house of prostitution. In this testimony she was corroborated by the testimony of Ho Bat, her husband. Jew Lin, whose

visit was the cause of her arrest, testified he was not in Chan Kam's bed, but sat on the corner of her bed, because there was no chair in the room. He had been invited by Ho Bat to visit him, and had done so pursuant to his invitation, and had been in the room only about three minutes when the arrest was made. Two Chinese witnesses who occupied an adjoining room in the building testified that Chan Kam was not a prostitute, and had not practiced prostitution. This evidence is not contradicted by any direct testimony. The case therefore rests upon a supposed statement made by Chan Kam concerning Jew Lin, which appears to have been incorrect, probably because of an incorrect interpretation. The statement, whatever it was, appears to have been obtained by an unfair examination of Chan Kam by the officers.

We think the rule applicable in this case was stated by this court in Ong Chow Lung v. Alfred E. Burnett, 232 Fed. 853, C. C. A. decided at the present term of court:

'It is not our function to weigh the evidence in this class of cases, but we may consider the question of law whether there was evidence to sustain the conclusion that the appellant, when he first came, fraudulently entered the United States. We find that that conclusion rests upon conjecture and suspicion, and not upon evidence. In the absence of substantial evidence to sustain the same, the order of deportation is arbitrary and unfair, and subject to judicial review. Whitfield v. Hanges, 222 Fed. 745, 751 (138 C. C. A. 199); McDonald v. Siu Tak Sam, 225 Fed. 710 (140 C. C. A. 584); Ex parte Lam Pui (D. C.) 217 Fed. 456.'

Judgment reversed, and the cause remanded, with instructions to discharge the appellant from custody."

III.

THAT THE ISSUANCE OF THE ORDER FOR ARREST IS UNSUPPORTED BY THE PROPER SHOWING AS REQUIRED BY SECTION 18 OF THE IMMIGRATION RULES.

On page three of the amended petition, lines 8 to 22, Rule 18 is set out, which requires in substance, that the application for the warrant of arrest "should be accompanied by some supporting evidence" and the "application should be accompanied by the affidavit of the person giving the information or a transcript of a sworn statement taken from that person by an inspector". A sworn statement of Donaldina Cameron is the basis for the issuance of the order, and in it the only charge against this petitioner is "and when we entered the premises this morning we found Chew Ling (a woman) in bed with Chan Ah Ho (this detained), who is known to the Chinese girls in the Mission as a prostitute". This statement is only hearsay at the most, and it is impossible to ascertain whether it refers to Chew Ling being a prostitute or Chan Ah Ho, and is an imposition upon the Secretary of Labor. It was evidently intended to convey the impression that this defendant was found in bed with a man, whereas the record shows said Chew Ling was a woman.

That the showing was insufficient for the purpose of issuing a departmental warrant, we cite the following case:

Ex parte Avakian, 188 Fed. 688.

> "A letter written by a U. S. Immigration Commissioner in Canada to a Commissioner at Boston requesting the issuance of a warrant for an alien's arrest in Massachusetts, and stating facts tending to a conclusion that when alien was admitted at Halifax she must have been diseased, was insufficient to show as a basis for the Secretary's warrant for the alien's arrest, an application therefor not complying with Immigration Regulations Rule 35, paragraph 3b."

See also:

U. S. ex rel. Bilokumsky v. Tod, supra.

CONCLUSION.

In conclusion we cannot too strongly urge upon this Court that the appellant has been denied a fair hearing by the refusal of the Commissioner of Immigration to subpoena the witnesses necessary for the defense against the charge. The law gives her that right—the rule of the Department provides for the machinery. When the Supreme Court called the attention of Congress to the fact that there was no provision for the subpoenaing witnesses in *Low Wah Suey v. Backus,* supra, so abhorrent was the proposition that Congress immediately extended that right. Notwithstanding the law the Commissioner of Immigration refuses to issue subpoenaes and takes upon himself the power to investigate a witness for whom the subpoena is asked and prejudge his testimony. In no other proceeding in the

land is it a prerequisite to obtaining a subpoena necessary to announce "what the witness is going to testify to". This is not a "fair hearing",—it is a star chamber proceeding.

Under all the circumstances in this case to have refused to issue the subpoena was to render the hearing manifestly unfair, and the judgment of the lower Court should be reversed and the writ granted.

Dated, San Francisco,
October 7, 1925.

Respectfully submitted,

J. H. Sapiro,
Attorney for Appellant.